

CORRECTED

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 746-764 and 776-794)	
MHz Bands, and Revisions to Part 27 of the)	WT Docket No. 99-168
Commission's Rules)	
)	
Carriage of the Transmissions of Digital)	CS Docket No. 98-120
Television Broadcast Stations)	
)	
Review of the Commission's Rules and)	MM Docket No. 00-83
Policies Affecting the Conversion to Digital)	
Television)	
)	

To: The Commission

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

August 16, 2000

TABLE OF CONTENTS

	Page
SUMMARY	iii
I. INTRODUCTION.....	2
A. PCC is a Broadcaster	2
B. PCC is Seriously Concerned about the State of the DTV Transition	8
C. Cases in Point	12
D. The 700 MHz Auction Presents an Opportunity to Help Right the DTV Ship	13
II. IMPORTANT PUBLIC INTEREST BENEFITS WILL RESULT FROM A TIMELY AUCTION	16
III. THE FCC CAN AND SHOULD ESTABLISH A FRAMEWORK TO FACILITATE BAND CLEARING.....	22
A. The FCC Should Issue an Order by November 13, 2000	22
B. A Secondary Auction Must Be Purely Voluntary and Cannot Involve Any Commission-Mandated Television Station Relocations.....	23
C. Secondary Auction Structure	24
D. Three-Way Voluntary Transition Agreements.....	24
IV. THE FCC MUST TAKE SPECIFIC ACTIONS TO IMPLEMENT VOLUNTARY AGREEMENTS AND A SECONDARY AUCTION.....	25
A. Digital Must Carry for Vacating Incumbents	25
B. Expedited FCC Processing	28
V. FCC REVIEW OF SPECIFIC CLEARING REQUESTS	29
VI. DIGITAL MUST CARRY IS CRITICAL TO BAND CLEARING.....	31
A. Without the Promise of Digital Must Carry, Incumbent Broadcasters Have No Incentive to Vacate the Band.....	31

TABLE OF CONTENTS
(continued)

	Page
B. The Law Requires Digital Must Carry for Vacating Incumbent Stations	31
C. The DTV Must Carry Proposal Is Based on The 1992 Cable Act	32
D. DTV Must Carry Furthers Important Government Interests	38
E. It is Time to Jump-Start the DTV Transition.....	41
VII. ADDITIONAL ISSUES THAT THE FCC SHOULD ADDRESS TO FACILITATE BAND CLEARING.....	41
A. The FCC Should Issue a Report and Order in the Cable Compatibility Proceeding.....	41
B. The FCC Should Resolve the Transmission Standard Issues.....	42
C. The FCC Should Permit Noncommercial Digital Stations to Air Advertiser-Supported Commercial Television Programming Via Excess Digital Spectrum.....	43
VIII. COST SHARING RULES FOR BAND CLEARING	44
IX. CONCLUSION	44

SUMMARY

Crucial decisions involving this country's communications development are today caught in a regulatory gridlock at the Federal Communications Commission. The five-year old transition to digital television broadcasting is in total disarray. The FCC has supported broadcast transmission standards that may not work. They have failed to issue the bulk of the necessary permits to build DTV stations and they have a build-out deadline mandate for May, 2002 that ignores the unavailability of towers, transmitters and antennas. There are virtually no digital TV receivers being purchased in the country, and there are no TV set compatibility standards as the cable and TV set manufacturers continue to bicker. A two-year old proceeding at the FCC to articulate DTV broadcasters' cable must carry rights remains unacted upon by the FCC. Television broadcasters are frantic and frustrated, and the American public is starting to point fingers.

The future wireless internet providers in the United States are faring no better at the FCC. These companies desperately need more spectrum and are looking anxiously at the 700 MHz spectrum which Congress has directed the FCC to auction for such use. With the auction now delayed for a third time, these wireless internet providers cannot be sure of when that auction will be held or how encumbered that spectrum will be. The FCC has yet to issue rules that would open the door to the full potential of this spectrum. To put the value of this spectrum in perspective, the bidding in the German auction, which is not yet complete and involves spectrum reaching approximately 82 million people, has already reached \$43 Billion. The spectrum to be auctioned in the

United States covers a population three times that of Germany's. The value of the German bids, if translated to the U.S. spectrum auction, could produce an absolute bonanza for the U.S. Treasury. Those auction proceeds and the continuation of the information revolution in the United States are in grave jeopardy unless the FCC acts now to take down the roadblocks. Those who are interested in the great promise of digital TV and the new wireless Internet would do well to read PCC's call to action for the FCC. The full filing is available at www.pax.tv/fccfiling.

In these Comments, PCC sets forth a blueprint for FCC action that will hasten the transition to digital broadcasting and unlock the potential of the wireless Internet for consumers. The real winners will be the U.S. consumer if the FCC faces the tough decisions and takes immediate action. The consumer will experience a new free over-the-air TV era with superb pictures and the ability to capture great new digital programming choices. Once the 700 MHz spectrum is made available through the U.S. auction, the consumer's use of the wireless Internet/cell phone phenomenon will become greatly enhanced, and it will usher in a quantum leap in communications and bring the Internet within the reach of every American, faster and easier than anything previously experienced.

PCC spells out with clarity the need for FCC action and when, for FCC attention rather than inattention and for an FCC to act now and not wait and worry about the political implications of its actions. Those who are interested in the digital broadcasting world, in the new wireless Internet and in continuing the communications/information

economic revolution in this country would do well to read PCC's Comments and urge the FCC to take the action requested.

PCC calls upon Congress to provide the FCC with a short timeline to make the necessary decisions and, in the alternative, suggests that Congress take action to ensure the future of American free over-the-air TV and the future of the wireless Internet. PCC calls on both political parties to make these issues part of the national agenda.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 746-764 and 776-794)	
MHz Bands, and Revisions to Part 27 of the)	WT Docket No. 99-168
Commission's Rules)	
)	
Carriage of the Transmissions of Digital)	CS Docket No. 98-120
Television Broadcast Stations)	
)	
Review of the Commission's Rules and)	MM Docket No. 00-83
Policies Affecting the Conversion to Digital)	
Television)	
)	

To: The Commission

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("PCC") submits herewith its comments in response to the Commission's *Further Notice of Proposed Rule Making*¹ regarding what steps it should take to facilitate clearing 30 MHz of the 700 MHz band that will be auctioned to wireless providers.² Directly and through wholly-owned subsidiaries, PCC owns the largest group of full power television stations in our nation – and the largest

¹ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-83, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224 (rel. June 30, 2000) ("*Further Notice*").

² Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Report and Order*, FCC 00-90 (rel. Mar. 9, 2000) ("*700 MHz Second Report and Order*").

number of stations in the channels 59-69 band. As a broadcaster, PCC believes there are important public interest benefits that could be obtained in clearing the band of allotted television broadcast stations prior to the end of the DTV transition period, and, consistent with the public interest, accordingly requests that the FCC take immediate specific steps to “jump-start” the DTV transition and establish rules for the spectrum auction, thus facilitating band clearing opportunities. If the FCC fails to act quickly or shows signs of leaving the issues to a new group of Commissioners, PCC would be compelled to lobby Congress to take the actions necessary to pressure the FCC or, better yet, legislate the issue to get the DTV transition going again, preventing another delay in the spectrum auction and set the stage to clear the 700 MHz spectrum.³

Now is not the time for the FCC to timidly shirk its statutory obligations. PCC is fully aware that the fast-approaching election might produce anxiety and paralysis within the Commission, which will undoubtedly be significantly different in composition by the March, 2001 auction date. But such concern must be put aside for the national good. This can no longer be a do-nothing Commission torn by ideological differences. The FCC must act quickly or this nation will lose its communications preeminence.

I. INTRODUCTION.

A. PCC is a Broadcaster.

PCC commenced its television operations in 1994 after many years in radio broadcasting. Its single-majority shareholder has over 45 years experience operating

³ Although the FCC only is auctioning the channels 60-69 band, channel 59 must be cleared as well to avoid interference that may be caused by adjacent-band operation.

broadcast licenses, and PCC's strategic partner, NBC, has been in broadcasting since the earliest days of television.

PCC has built the largest broadcasting television station group in the United States in a short six year span by laboring in the upper reaches of the UHF spectrum. Upon completion of pending acquisitions, construction projects, other transactions, and divestitures, PCC will own 67 full power television stations, which, in combination with over 50 non-owned affiliates, makes up the distribution of the **PAXTV** network. **PAXTV** now reaches approximately 81% of the television households in the country and continues to expand. The vast majority of these stations are UHF stations that PCC has constructed from FCC-issued permits, rebuilt, and/or otherwise infused with capital and improved their technical facilities.

PCC's ownership of these stations enabled the 1998 launch of the seventh network, **PAXTV**, providing viewers a safe haven of over-the-air television programming for the American family and leading to increased video programming competition. **PAXTV** provides a unique selection of family-friendly programming unduplicated by the other free over-the-air broadcast television and/or cable networks. The majority of **PAXTV** programming consists of one-hour drama, situation comedy, talk and information programs and movies. The **PAXTV** philosophy is to provide family friendly programming free of explicit sex, gratuitous violence, and foul language, and is staying true to its mission. **PAXTV** is the first network to package programs with a family focus. **PAXTV** has answered Commissioner Tristani's call for broadcasters to act in the interests of our children:

Four major health organizations reminded us again that television violence has a harmful and noxious impact on our children. Entertainment violence is polluting the minds of our children. We don't need 50 years of studies – like we had on smoking – to know that entertainment violence has a toxic effect.

Today I call on the entertainment industry, and particularly the broadcasting industry, to stop violating the minds of our children. I will also be asking the FCC Chairman to hold a Commission hearing on television violence and the public interest obligations of broadcasters.⁴

PAXTV welcomes the Commissioner's call to DTV arms and notes that **PAXTV** will create and launch multiple channels of free over-the-air family friendly programming in the digital world – if there is full digital must carry. Two years before our two major political national parties included “family-friendly” in their campaign platforms, **PAXTV** was providing the only free, family friendly programming service on an over-the-air network basis. **PAXTV** acknowledges its public interest obligations and urges the Commission to recognize its obligations: finish the ingredients for the DTV transition process, correct the mistakes that have been made, and stop delaying the DTV must carry ruling and spectrum auction.

Since the early 1990's, the UHF analog spectrum, coupled with the Congressional must carry law, has taken America from three broadcast television networks to nine, and **PAXTV** is proud to be part of this phenomena.

PAXTV is adding new and appealing programs as it starts its third year. Through its strategic relationship with the National Broadcasting Company (“NBC”), **PAXTV** is broadcasting weekly extended prime time coverage of the “2000 U.S. Olympic Team

⁴ Statement of FCC Commissioner Gloria Tristani on The Impact of Entertainment Violence on Children (July 26, 2000).

Trials” leading up to this year’s Olympic Games in Sydney this September. This includes original coverage of archery, canoeing, cycling, equestrian, fencing, marathon, rowing, sailing, triathlon, volleyball, water polo, weightlifting and wrestling.

The foundation of the **PAXTV** Monday through Friday primetime schedule includes original series “Twice In A Lifetime,” “It’s a Miracle,” “Hope Island,” and “Mysterious Ways.” New 8:00 p.m. series slated to premiere during the network’s third season include “Masters of Illusion,” “Encounters With the Unexplained,” and “The Rumfords.” This fall, the network will introduce the “PAX Big Event” on Sunday nights, showcasing original made-for-television movies and mini-series, specials and popular theatrical films including “Doc,” a dramatic original **PAXTV** movie starring country superstar Billy Ray Cyrus; “Once Upon A Christmas,” a lighthearted holiday movie starring Kathy Ireland and John Dye; three full-length original “Christy” movies; the “Mrs. America” and “Mrs. World” pageants and much more. Additionally, the lineup features off-network runs of the hit series “Touched By An Angel,” “Diagnosis Murder,” “Promised Land” and “Our House.”

PAXTV, in conjunction with NBC owned and affiliated stations, has started to roll out new local news casts in many of its markets. In twelve markets including New York, Los Angeles, Chicago, Dallas, Washington, D.C., Providence, Philadelphia, Miami, Raleigh-Durham, Hartford, Birmingham and Milwaukee, the PCC owned station is broadcasting a 7:00 p.m. and 11:30 p.m. daily 30-minute news program (6:30 p.m. and 11:30 p.m. in Milwaukee), and further roll-outs of such local news programs is expected this year in many additional PCC stations.

In 1998 when Bud Paxson launched **PAXTV**, he was concerned that after a career of 45 years in broadcasting, something was missing in television. The “Family Viewing Hour” had disappeared, the voluntary NAB TV Code was no longer in effect, and existing broadcast networks were offering “adult” content in prime time often as early as 8:00 p.m., (*i.e.*, in the family viewing hour). He knew the majority of Americans wanted something better for their families, so he created **PAXTV** as a safe haven for family viewing and as a way to offer uplifting messages to the television audience in an entertaining way.

The need for a **PAXTV** is as strong today as it was in 1998. In a May 25, 2000 letter to Chairman Kennard, four leading Senators wrote:

As you well know, frustration and anger about falling standards have been voiced for some time by millions of American parents, who are fed up with the rising tide of glorified violence and increasingly explicit sexual content flooding into their homes through their televisions.

* * *

Much of this content is clearly unsuitable for children, millions of whom are watching during the hours these programs are regularly broadcast. In fact, a case could be made that portions of some programs are so offensive that they meet the Commission’s legal standard for indecency – “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.”

* * *

The denials and excuses we routinely hear today from the industry raise serious questions about the commitment of many broadcasters to serving the public interest, as they are obligated to do by law. We must remember that broadcasters are trustees of a public resource worth billions of dollars, which they get access to for free, in return for a pledge to act as responsible stewards of the airwaves. The license they receive is a legally-binding contract, an especially important one given television’s immense influence on our children and our culture. And much to our dismay, the evidence presented in this letter strongly suggests that many

licensees, along with their network parents, are breaching this public trust, and harming rather than serving the public interest.⁵

PCC agrees with these Senators and notes with pride its continuing efforts to provide television programming free of such content and its intention of creating and launching multiple channels of family friendly programming in the digital world.

PCC enjoys being a broadcaster and likes the business. PCC worked hard to build the seventh network, adding value to stations in communities across the country, building new facilities, resurrecting bankrupt stations, and modernizing older UHF stations. PCC is committed to broadcasting and takes seriously the many important roles of being a responsible broadcaster. **PCC is excited about the future of broadcasting – and that future is DTV.** As the nation's largest owner of broadcast television licenses, perhaps no other station owner faces as large a task as PCC: placing over sixty new DTV stations into operation in less than two years. This investment in digital is enormous but absolutely critical if free, over-the-air television broadcasting is to remain competitive as an entertainment platform. Broadcasters' future is in programming – not datacasting – because that is what we do.

Whether analog or digital, **PAXTV's** success depends to a large extent on cable carriage for its coverage disadvantaged UHF affiliates. Without must carry, many UHF television stations would not have survived because of denied access to the cable systems serving their markets. PCC's UHF stations operate under a technological handicap that is reflected in the FCC's UHF discount employed in measuring audiences

⁵ Letter from Senators John McCain, Joe Lieberman, Robert Byrd and Sam Brownback to William Kennard (May 25, 2000) (internal citations omitted).

for national ownership cap purposes. As recently as this past June, the FCC reaffirmed the UHF handicap and acknowledged the continuing validity of the UHF discount designed to level the television playing field.⁶ The need for the UHF discount remains as strong today as it was in 1985. Mandatory cable carriage of these stations has been critical to their improved economic status. Without must carry, there would have been no emergence of the Fox, **PAXTV**, UPN, WB, Univision, or Telemundo networks, with their affiliates in localities throughout the country. The importance of must carry for these stations and their network will only be heightened by the transition to DTV.

B. PCC is Seriously Concerned about the State of the DTV Transition.

As a committed and responsible broadcaster, PCC is very concerned about the present state of the DTV transition and its immediate prospects. The FCC's goals for a rapid DTV implementation and a rapid spectrum recovery⁷ are in jeopardy. The Congressional Budget Office frankly has concluded that "[i]t now appears likely that the [DTV] transition will extend beyond [the scheduled] 2006 in most markets, with its ultimate end date uncertain."⁸ Nothing reported in last month's Congressional hearing contradicts this view.⁹ Despite continually falling prices, after more than two years into

⁶ 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, *Biennial Review Report*, FCC 00-191, at ¶35 (rel. June 20, 2000).

⁷ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, 12812 (1997).

⁸ *Completing the Transition to Digital Television*, Congressional Budget Office, Congress of the United States (Sept. 1999).

⁹ *Hill Questions Slow DTV Rollout as Modulation is Debated*, COMMUNICATIONS DAILY, July 26, 2000.

the DTV transition only 40,000 digital receivers have been purchased – an insignificant number compared to the 260 million television receivers that viewers nationwide must replace.¹⁰ Even more disturbing, sales of digital receivers are falling sharply.¹¹

The FCC appears overwhelmed. The agency is burdened with DTV processing delays, having granted only 525¹² of the over 1,600 DTV construction permits it must issue for commercial and noncommercial stations. Of the 62 digital television stations that PCC must construct before May 1, 2002, the FCC has granted construction permits for only 3 (*i.e.*, less than 5%). The FCC has been unable to put to rest questions about the adequacy of the DTV transmission standard. Almost a year after Sinclair Broadcast Group formally sought to allow stations to employ either the adopted 8-VSB transmission standard or the alternative COFDM,¹³ and six months since the FCC denied the request,¹⁴ there is no consensus in the television industry on how to dependably deliver digital TV content to the viewer.¹⁵ The FCC has had no success in getting television set manufacturers, content providers, and cable operators to agree on

¹⁰ Joel Brinkley, *Digital TV Era Still Remains Out of Reach*, N.Y. TIMES, Aug. 7, 2000, at C1.

¹¹ *Id.*

¹² FCC Status Report (Aug. 2, 2000) (visited August 12, 2000) <<http://www.fcc.gov/mmb/vsd/files/dtvsum.html>>.

¹³ Petition for Expedited Rulemaking, Sinclair Broadcast Group (dated Oct. 8, 1999).

¹⁴ Letter from Magalie Roman Salas, Secretary, FCC, to Mr. Martin R. Leader, counsel, Sinclair Broadcast Group (Feb. 3, 2000) (FCC 00-35).

¹⁵ Joel Brinkley, *Digital TV Era Still Remains Out of Reach*, N.Y. TIMES, Aug. 7, 2000, at C1.

standards for digital content delivery from digital television stations on cable systems. A series of threats by the FCC has been ignored, resulting in little more than an unpromising Notice of Proposed Rulemaking¹⁶ and disputed agreements.¹⁷ Resolution of copy-protection questions in the near future seems all but hopeless.¹⁸ **LOOK**, after two full years, the FCC has yet to produce digital must carry rules.¹⁹

These results were unfortunately predictable, flowing from the FCC's confusing claim to prefer market solutions. Chairman Kennard says "some [DTV stations will] fail to make it.... We'll see winners and losers."²⁰ Commission Ness asks, "Will [digital broadcasting] be a boom or a bust? That only the marketplace can answer."²¹ Undoubtedly, FCC favors market solutions, but the market is not authorized to adopt DTV transmission standards, and stations cannot construct DTV facilities without FCC authority to do so. Only the FCC can establish digital must carry and require cable and television set compatibility. There are certain transition and implementation measures that only the federal government can take. The FCC, however, has no answers to the

¹⁶ Compatibility Between Cable Systems And Consumer Electronics Equipment, PP Docket No. 00-67, *Notice of Proposed Rulemaking*, FCC 00-137 (rel. Apr. 14, 2000).

¹⁷ Doug Halonen, *Digital Television Derailed*, ELECTRONIC MEDIA (July 17, 2000).

¹⁸ See, Joel Brinkley, *Digital TV Era Still Remains Out of Reach*, N.Y. TIMES, Aug. 7, 2000, at C1.

¹⁹ Proceeding initiated in Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 1092 (1998).

²⁰ Remarks of William E. Kennard to the International Radio and Television Society, New York, New York (Sept. 15, 1998).

²¹ Remarks of Susan Ness to the California Broadcasters Association, Monterey, California (July 27, 1998).

disturbing DTV transition issues, and the results, inadvertent or not, are delaying the digital TV transition. None other than Commissioner Powell calls the DTV transition “a potential train wreck.”²²

In September 1998, Chairman Kennard outlined four actions he felt the FCC had to take to complete the DTV transition: (i) establish a build-out schedule; (ii) complete international agreements; (iii) establish set interoperability standards; and (iv) resolve the DTV must carry proceeding.²³ Two years later, the FCC has still not completed two of its four tasks! FCC action is long overdue on set interoperability and DTV must carry, and it may be time for Congress to establish a schedule for FCC action. As Broadcasting and Cable Magazine noted last month, “lack of FCC resolve in bringing the competing industries together has cost the public three years of digital progress.... For free, over-the-air digital broadcasters there aren’t many more to lose.”²⁴ PCC would only add Amen!

And what are the stakes? Commissioner Powell says there is a limited window of success: “I’m not sure we’ll get two or three shots at [implementing DTV]. I think it

²² Bill McConnell, *Powell Raises Red Flag Over DTV Switch*, BROADCASTING & CABLE, Sept. 21, 1998, at 22.

²³ Remarks of William E. Kennard to the International Radio and Television Society, New York, New York (Sept. 15, 1998).

²⁴ *First Things First*, BROADCASTING & CABLE, July 31, 2000, at 78.

will be extraordinarily difficult to achieve the ubiquitous customer acceptance that is necessary for success.... A change this dramatic needs to be done right.”²⁵

C. Cases in Point:

The FCC’s mismanagement thus far culminates in its failure to set the stage for clearing channels 60-69. The FCC has made no effort to use its rulemaking authority to issue rules supporting efforts to clear the band. In April 1997, the FCC issued the DTV Table of Allotments with a number of stations assigned DTV channels in the 60-69 band.²⁶ Four months later, Congress directed the FCC to reallocate the spectrum and commence competitive bidding for licenses in the commercial portions after January 1, 2001.²⁷ Notified of the impending auction, the FCC had two opportunities on reconsideration to clear out the DTV channels that it imprudently allocated in the 59-69 band, but only offered that “[h]ad other channels been available, they would have been allotted to these broadcasters.”²⁸ Action on the FCC’s part would have facilitated band

²⁵ Bill McConnell, *Powell Raises Red Flag Over DTV Switch*, BROADCASTING & CABLE, Sept. 21, 1998, at 22.

²⁶ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Sixth Report and Order*, 12 FCC Rcd 14588 (1997) (“*DTV Sixth Report and Order*”).

²⁷ 47 U.S.C. § 337(b)(2)(a). In November 1999, Congress accelerated the auction so that proceeds would be deposited in the U.S. Treasury by September 30, 2000. See Pub. Law 106-113 Stat. 1501, Appendix E, § 213.

²⁸ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, at ¶93 (1998); Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348 (1998).

clearing and accelerated the DTV transition by reducing from 144 to 103 the number of allocations to be cleared out of the 700 MHz spectrum for the next generation of wireless users.

Even efforts to assist the FCC have been met with silence and inaction. On its own initiative, PCC asked consulting engineers to conduct a study of whether any of the five DTV allocations in the channels 60-69 band in the Los Angeles DMA could be reallocated to other DTV channels. PCC informed the FCC that it had identified seven channels that held promise for DTV use.²⁹ The use of some or all of these channels would significantly free up the 700 MHz band and have a positive impact on the spectrum auction. The FCC has yet to respond.

Another example of DTV mismanagement is the FCC's neglect of broadcasters' use of translators to reach viewers in a station's market, especially in rural areas. The FCC has offered little accommodation in its policies for the licensing of digital translators to broadcasters, crippling their ability to obtain actual replication of their existing free programming service in the digital world. This will adversely impact the ability of low power and translator stations that provide irreplaceable over-the-air service to the viewing public in America's most rural areas.

D. The 700 MHz Auction Presents an Opportunity to Help Right the DTV Ship.

The 700 MHz auction offers the FCC a special opportunity to jump-start the DTV transition. Certain elements and interests have aligned, handing the FCC – **and,**

²⁹ Letter from Lowell W. Paxson to Commissioner Susan Ness (June 6, 2000).

except for Congress, it is only the FCC that has the power to do this – the chance to achieve a number of public interest benefits in one stroke.

The reallocation of the channels 60-69 band is an essential part of the FCC's digital television process, in which broadcast television stations are transitioning from analog to digital operations. In the *DTV Sixth Report and Order*,³⁰ the FCC stated that during its repackaging of available television channels into a "core spectrum," all analog and digital television stations in the channels 60-69 band – scheduled for early reallocation – would be fully protected during the DTV transition period. A few months later, in the Balanced Budget Act of 1997, Congress provided additional guidance, specifying that 36 MHz of the channels 60-69 band be reallocated for commercial use and assigned by competitive bidding.³¹ Congress further specified that incumbent television stations in the channels 60-69 band would be removed at the end of the DTV transition period,³² unless general market acceptance of digital television fell short of specified levels.³³

In 1999, Congress accelerated the timing of the 700 MHz auction.³⁴ Since then, under pressure from the wireless industry, the FCC has delayed the auction three times

³⁰ See *DTV Sixth Report and Order*, 12 FCC Rcd at 14626-27.

³¹ 47 U.S.C. § 337(a).

³² 47 U.S.C. § 337(e).

³³ 47 U.S.C. § 309(j)(14)(B).

³⁴ Pub. Law 106-113 Stat. 1501, Appendix E, § 213.

– now scheduled for March 6, 2001 – to permit additional time for bidder preparation.³⁵

As a result, the 700 MHz auction will not be completed within the time Congress directed.³⁶

PCC has significant interest in the outcome of this proceeding. PCC owns eighteen analog stations and one digital allotment in the channels 59-69 band³⁷ – representing nearly one out of every seven affected stations. PCC also has participated in filings to the Commission, acknowledging the public benefits of an accelerated band clearing that would allow the timely provision of innovative wireless internet services.³⁸ Broadcasters have no incentive to clear the band, however, unless assured that viewers can continue to receive a station's signal. The only reasonable means to accomplish this is to establish full digital must carry rights, which are constitutionally due. The confluence of these issues and interests presents the FCC with the leverage to achieve both accelerated band clearing and accelerated DTV implementation. It is difficult to imagine the FCC gaining a more stunning regulatory accomplishment. The FCC's

³⁵ Federal Communications Commission, *Public Notice*, Report No. AUC-00-31-I (July 31, 2000).

³⁶ The auction proceeds were to have been deposited in the U.S. Treasury by September 30, 2000. Pub. Law 106-113 Stat. 1501, Appendix E, § 213.

³⁷ WPPX(TV), Wilmington, DE; KKPX(TV), San Jose, CA; WBPX(TV), Boston, MA; WPXB(TV), Merrimack, NH; KPXD(TV), Arlington, TX; WPXW(TV), Manassas, VA; WWPX(TV), Martinsburg, WV; WXPX(TV), Bradenton, FL; KPXC-TV, Denver, CO; WIPX(TV), Bloomington, IN; WFPX(TV), Fayetteville, NC; WPXP(TV), Lake Worth, FL; KOPX(TV), Oklahoma City, OK; WPXQ(TV), Block Island, RI; WQPX(TV), Scranton, PA; KPXF(TV), Porterville, CA; KPXO(TV), Kaneohe, HI; and WVPX-DT, Akron, OH. An acquisition of station WAOM(TV), Morehead, KY is pending.

³⁸ PCC *ex parte* filing of May 3, 2000; PCC *ex parte* filing of May 26, 2000.

opportunity, however, may be fast fleeting, and it is easy to imagine the FCC ignoring the opportunity. With the possibility of major changes in the makeup of the Commission, the likelihood of a do-nothing, leave-it-to-the-next-person attitude poses a serious threat to the DTV transition and the future of the 700 MHz auction. In all probability, more auction delays are forthcoming.

II. IMPORTANT PUBLIC INTEREST BENEFITS WILL RESULT FROM A TIMELY AUCTION.

A timely 700 MHz auction presents a unique opportunity for the FCC to realize important public interest benefits. By clearing the band early, new and powerful wireless services reach the market sooner. By establishing full digital must carry rights, digital transmission standards, receiver standards, and cable compatibility issues, incumbent broadcasters have an incentive to clear the band. Viewers of displaced analog stations could continue to receive television service, and, with so many stations solely relying on digital service, the FCC will make a major impact on faltering DTV transition.

The six-month delay of the 700 MHz auction that the wireless industry supported will allow the FCC to develop and sanction methods to facilitate easier band clearing³⁹ – if the FCC acts without delay. Further delays, however, especially in light of statutory directives, are neither wise nor warranted. Prospective bidders in the 700 MHz auction have known since January that the FCC would consider voluntary band clearing

³⁹ Federal Communications Commission, *Public Notice*, Report No. AUC-00-31-I (July 31, 2000).

agreements.⁴⁰ The important public benefits which give the FCC authority to sanction early band clearing are threatened if the auction is delayed further. Broadcasters are prepared to move forward, but not indefinitely. Accordingly, delaying the 700 MHz auction beyond March 6, 2001 would not be in the public interest, because it would worsen the DTV malaise, threaten the development of the wireless internet in this country, cripple the information revolution, and deny the U.S. Treasury of the auction proceeds.

It is disingenuous to permit any further delays in the 700 MHz auction based on the need to clear the channel 59-69 band, or on the alleged unwillingness of incumbent television stations to negotiate. Six months ago, the FCC Chairman recognized how intertwined the present users and future users of this spectrum were:

I urge incumbent broadcasters to negotiate voluntarily with incoming licensees, so that this valuable spectrum can be used quickly to its maximum capacity. While negotiations and voluntary agreements to accelerate moving to new assignments can be accomplished under existing case-by-case waivers, I would like to see an easier, more market-driven process.⁴¹

By letter dated March 31, 2000, PCC urged the Commissioners to move on digital must carry because of the implications for the 700 MHz auction,⁴² and it repeated

⁴⁰ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, FCC 00-5, 18 CR 1435, at ¶145 (rel. Jan. 7, 2000) ("*700 MHz First Report and Order*").

⁴¹ Remarks of William E. Kennard To the Cellular Telecommunications Industry Association, New Orleans, Louisiana (Feb. 28, 2000).

⁴² Letter from Lowell W. Paxson to the FCC Commissioners (Mar. 31, 2000).

this admonition in a July 20, 2000 letter to the FCC.⁴³ In letters dated May 25, 2000 and July 17, 2000 PCC wrote to the potential 700 MHz bidders and asked them to contact PCC if they were interested in discussing the issues surrounding spectrum clearing. PCC opened the door for such discussions but not one bidder has yet to step through and meet with PCC. To PCC's knowledge, none of the bidders has approached any of the other incumbent broadcasters.

If the 700 MHz bidders will not talk to broadcasters about band clearing, then surely they cannot blame broadcasters for the delay in the auction or a delay in developing a wireless internet in this country. It may be that telecommunications companies wish to delay the 700 MHz wireless auction to delay cannibalizing their own wireline businesses. Broadcasters await a dialogue with the bidders but will be hard pressed to consider clearing the channel 59-69 band until the FCC finishes its long overdue work. PCC and other television incumbents simply cannot cripple their businesses by vacating analog spectrum for a digital world now riddled with FCC-generated problems.

Accelerated DTV Transition. PCC believes that broadcasters will not stand as unreasonable impediments to the timely implementation of innovative wireless technologies such as "2.5" or "3G" services,⁴⁴ and it stands prepared to enter into voluntary, privately negotiated agreements to permit the early introduction of such

⁴³ Letter from Lowell W. Paxson to William E. Kennard, Chairman, Federal Communications Commission (July 20, 2000).

⁴⁴ *Further Notice* at ¶61.

valuable services. However, just as the Commission desires to promote innovation for the wireless industry through band clearing, the Commission must concurrently accelerate the DTV transition by requiring mandatory cable carriage of broadcasters' digital multicast signals. Indeed, the FCC cites the notion of an accelerated DTV transition as a basis for its authority to facilitate band clearing.⁴⁵

The FCC can accelerate the DTV transition by establishing clearing policies that incentivize displaced analog stations to commence DTV operations on their digital allotments within 18 months of receiving their final DTV construction permit. Besides clearing the band by a date certain, this will result in dozens of broadcast stations transmitting solely in digital, which will drive and facilitate the DTV transition in numerous ways. Prior to making an investment in new DTV sets, consumers would obtain needed certainty that they can and will receive digital signals. Consumers also obtain the certainty that digital programming has reached a critical mass. An accelerated DTV transition means an accelerated market penetration, which, in turn, means an accelerated recovery of valuable analog spectrum, which the government intends to auction off for additional revenues. Full DTV must carry significantly improves the chances for DTV's success.

Further auction delays diminish the viability of this opportunity by introducing uncertainty into an already constrained DTV construction timeline. For example, in the Boston market, PCC timely filed its DTV construction permit application for WPXB(TV),

⁴⁵ *Id.* at ¶51.

Merrimack, New Hampshire (analog channel 60),⁴⁶ proposing operation on the existing tower that currently accommodates its analog operations. The station since has discovered that the existing tower physically cannot support both the analog and digital antennas, and thus PCC is required to find a new site. After locating a suitable piece of property and initiating the FAA and local zoning process, it appears that there is local opposition to PCC's efforts to construct the new digital tower. For PCC, this process is being repeated many times around the country and probably hundreds of times for all broadcasters. If PCC (and other broadcasters) were assured, however, of full digital must carry and, thus, a clear road to clearing the analog spectrum, it would not waste valuable resources seeking to build another tower.⁴⁷ PCC simply would replace its analog antenna and equipment with new digital equipment on the existing tower – and save hundreds of thousands of dollars in the process. PCC has been informed such a switch-over would only take the station off the air for 72 hours, but the cost savings would be immense. The total cost savings for all similarly situated broadcasters would be in the millions.

It is one thing for a broadcaster to construct its digital station before May 1, 2002, but it is quite another for the station to complete all arrangements to terminate analog operation and ensure that its DTV signal can be optimally received (*e.g.*, gaining actual

⁴⁶ FCC File NO. BPCDT-19990930AAX.

⁴⁷ PCC expects that tower construction capacity also will become an issue very soon, as inquiries into materials availability are resulting in longer and longer delivery times.

digital cable carriage). Accordingly, a timely auction protects the opportunity for accelerating the DTV transition.

Accelerated Spectrum Availability. The FCC recognizes that an accelerated clearing of the channels 59-69 band represents an important public interest objective.⁴⁸ The valuable wireless services promised by 3G and the like will prove powerful in the hands of consumers and businesses. The frequencies to be auctioned represent prime real estate in the electromagnetic spectrum. Delaying the 700 MHz auction, however, not only delays the roll-out of new wireless services, it increases the likelihood that the spectrum will remain encumbered indefinitely, which diminishes the possibility of prospective licensees building out wireless internet systems and placing this valuable spectrum into use. A delayed auction thus would depress spectrum valuations. A timely auction keeps the window open for clearing the band and making the spectrum widely available.

Sustained Prosperity and Technological Leadership. Further auction delays obstruct the public's healthy demand for more capable wireless services and is a risk to the country's continued leadership in technology and prosperity. The internal combustion engine drove the economy for the last hundred years. Likewise, economists see the 700 MHz spectrum as substantially augmenting existing CMRS systems, opening the door for ubiquitous mobile services.⁴⁹ The implications for the economy as a whole obviously are enormous. The wireless internet could drive the

⁴⁸ *Further Notice* at ¶80.

⁴⁹ *700 MHz First Report and Order* at ¶38.

U.S. economy for decades. A timely 700 MHz auction and FCC decisions to help an ailing DTV transition with necessary Orders will help ensure that the United States remains strong economically, the technological envy of the world, and at the forefront of the information revolution.

III. THE FCC CAN AND SHOULD ESTABLISH A FRAMEWORK TO FACILITATE BAND CLEARING.

The FCC has authority to facilitate rules that would stimulate an early clearing of channels 59-69, consistent with the public interest – but does it have the will to act?! PCC supports the use of a Commission-sanctioned, but privately conducted, secondary linkage auction to help clear channels 59-69. Thus far, the FCC's inaction on band clearing – disguised as private market reliance – has given wireless bidders little hope that spectrum encumbrances will be removed. FCC mismanagement of the band has resulted in do-nothing, go-nowhere policies. The FCC must overcome its regulatory inertia and take affirmative steps to facilitate the DTV transition and thus band clearing.

A. The FCC Should Issue an Order by November 13, 2000.

The FCC must do its part to facilitate the band clearing process. To ensure that the 700 MHz auction is timely held, the FCC should issue a Report and Order in this proceeding by November 13, 2000. Likewise, the FCC should issue by November 13th the Report and Order for full digital must carry, authorize both or select either the COFDM or 8-VSB digital transmission standards, and establish operability standards for DTV sets. This will give parties sufficient time to finalize bidding plans before the March 2001 auction, allow incumbent broadcasters to evaluate band clearing possibilities, and provide wireless bidders clear indication of the availability of the 700 MHz spectrum.

B. A Secondary Auction Must Be Purely Voluntary and Cannot Involve Any Commission-Mandated Television Station Relocations.

The Commission has no authority to force a station to terminate licensed broadcast service for the sake of facilitating early band clearing. To the contrary, when establishing an early start date for the 700 MHz auction, Congress plainly was aware that analog television service in the band would be protected throughout the DTV transition period, which it explicitly permitted to extend beyond 2006 if less than 85% of households are capable of receiving digital broadcasts (via all delivery methods).⁵⁰ Congress clearly was aware of the auction structure it created.⁵¹ If Congress had intended to permit mandatory termination, or effectively mandatory termination, of television service in the band, it would have said so. Accordingly, the FCC cannot force broadcasters to participate in a secondary linkage auction. Likewise, the FCC cannot impose a mandatory relocation of television stations to circumvent efforts of a “hold-out” broadcaster to continue serving viewers as Congress intended.

Voluntary agreements and a voluntary, incentive-based secondary auction, however, *are* consistent with the FCC’s public interest obligations. Voluntary agreements and a secondary auction can accelerate the availability of the 700 MHz spectrum for innovative wireless services and, as established herein, can accelerate the DTV transition. PCC consistently has been committed to voluntary relocation of

⁵⁰ 47 U.S.C. § 309(j)(14)(B).

⁵¹ As a matter of statutory construction, legislative language is interpreted generally on the assumption that the legislature was aware of existing statutes. A. Sutherland, STATUTORY CONSTRUCTION § 45.12, at 62 (5th ed. 1995).

incumbent broadcast licensees through private agreements and recognizes that the use of a voluntary secondary auction can reduce the aggregate transaction cost of attempting to clear approximately 140 stations. Accordingly, Congress' grant to the FCC of general authority over spectrum management issues⁵² is sufficient under these circumstances for the agency to sanction voluntary efforts to clear the band – so long as such efforts substantially furthering clear public interest obligations and are consistent with existing statutes and regulations.

C. Secondary Auction Structure

PCC recommends that the FCC sanction and structure the secondary linkage auction as follows:

1. The secondary auction should be conducted by an independent third party chosen by broadcasters and wireless bidders. The party chosen shall be competent in conducting private auctions and more than sufficiently familiar with the 700 MHz proceeding. PCC recommends Spectrum Exchange and Allen & Co.
2. PCC awaits specific details for the structure of the secondary auction that are likely to be filed in this proceeding.
3. PCC will file reply comments by September 15 to note specific issues necessary for the FCC to consider, which could lead to PCC's participation in a secondary auction.

D. Three-Way Voluntary Transition Agreements.

PCC supports permitting three-party agreements as a natural extension of band clearing efforts – subject to the same conditions and public interest objectives set forth

⁵² See, e.g., 47 U.S.C. §§ 301 and 303.

for two-party agreements and the secondary auction.⁵³ PCC would entertain requests to enter into such three-way agreements.

IV. THE FCC MUST TAKE SPECIFIC ACTIONS TO IMPLEMENT VOLUNTARY AGREEMENTS AND A SECONDARY AUCTION.

Band clearing alone is insufficient for the FCC to have authority to sanction voluntary band clearing. The voluntary agreements and secondary auction must contribute more to the public interest than simply providing accurate wireless bidding evaluations. The 700 MHz auction is born of the digital television transition, and the FCC should ensure now that the transition is advanced and protected.⁵⁴ Accordingly, the FCC should adopt the actions proposed below to ensure the early clearing has legal (and broadcaster) support. Otherwise, PCC has no plans to terminate analog service prior to the close of the transition, which may well go on into the second decade of this new century.

A. Digital Must Carry for Vacating Incumbents.

Incumbent broadcasters must receive full digital mandatory carriage rights – which would include any free, multicast video programming aired by a station. Without full digital must carry, incumbent broadcasters have no incentive to clear the band. Almost all viewers of a vacating station would lose service, a scenario that broadcasters cannot accept. Moreover, such loss of service may not be legally sustainable. By

⁵³ *Further Notice* at ¶¶ 87-92.

⁵⁴ The FCC relies upon the notion of accelerating the DTV transition as a basis for its authority to sanction and review voluntary clearing agreements. *Id.* at ¶51.

establishing vacating broadcasters' must carry rights, the FCC will have done its best to ensure that service losses are minimized in a manner consistent with statutory language addressing the transition.

When PCC builds its DTV stations within the core spectrum, it is imperative that it be guaranteed full must carry rights for its DTV signals because of the audience loss it will experience by turning off its analog stations. At the present time, nearly 30% of all households are without cable or satellite and, even in cabled and satellite households, nearly half the television sets are not connected and dependent on over-the-air reception. PCC will lose this over-the-air audience immediately upon going to digital-only operations, given the almost negligible digital receiver penetration, and, thus, will lose up to 30% of its audience for **PAXTV**, its network television service. Such a loss of audience will translate into an enormous loss of revenue for the stations and the company. **PAXTV**, the nation's seventh and family-friendly television network, is at an operational break-even point. PCC has had positive EBITDA and positive cash flow for two of the last three quarters. A loss of 30% of its audience would likely plunge PCC back into further losses. Only full digital must carry of all multicast channels can lessen the devastating impact of such audience losses in any meaningful manner. Without an acceptable DTV must carry rule in place, PCC will not enter into voluntary agreements and will not voluntarily participate in a secondary auction. With a full DTV must carry rule, PCC submits that the Government will receive increased auction proceeds, the digital transition will be accelerated, full use of the 700 MHz spectrum by the wireless

companies will come earlier, and PCC will create and launch more family friendly networks.

Digital must carry rules should be established for both cable operators and direct-to-home (“DTH”) satellite providers. Congress imposed mandatory carriage obligations on satellite carriers that are substantially similar to those which cable operators are subject.⁵⁵ The FCC should incorporate into its satellite must carry rules the same definitions, conditions, and requirements that it has developed in the context of the cable must carry rules (to the extent technologically feasible and legally permissible). Congress required the FCC to impose digital broadcast signal carriage obligations on DTH satellite operators that are “comparable” to those imposed on cable operators.⁵⁶ PCC urged the FCC to permit broadcasters to elect satellite carriage of DTV signals in place of analog signals (in lieu of a dual carriage requirement) and thereby accelerate the DTV transition.⁵⁷ DTH providers should be required to carry broadcasters’ entire digital signal – including multicasting – on a phased-in basis. The time is now to adopt such rules, and PCC opposes the position of NAB that this Commission should delay for one year the adoption of DTH digital must carry rules. PCC and many other television broadcasters believe that the digital revolution is upon us now and that carriage provisions for the digital world are needed now – not a year from now.

⁵⁵ Compare 47 U.S.C. § 534 (cable) with § 338 (DTH satellite).

⁵⁶ 47 U.S.C. § 338(g).

⁵⁷ PCC Comments, Implementation of the Satellite Home Viewer Improvement Act of 1999, CS Docket No. 00-96, at p.8 (July 14, 2000).

B. Expedited FCC Processing.

The FCC must give expedited processing (*i.e.*, act within 60 days of filing) to all applications (modifications, STAs, etc.) filed by incumbent broadcasters seeking to commence digital operations on the lower channels. If incumbent broadcasters are willing to terminate analog service – the format familiar to its viewers – and ramp-up DTV operations as quickly as necessary, then the FCC must eliminate regulatory processing delays. PCC understands that the FCC is burdened by an enormous number of DTV applications, predictably straining agency resources. However, PCC is seriously concerned about the scale of the delay. As noted, PCC has submitted 62 DTV construction permit applications and only 3 have been granted. The DTV construction deadline is only 21 months away. To ensure that DTV service for vacating stations commences as quickly as possible, the FCC must prioritize processing and expeditiously act on the necessary DTV filings. Accordingly, the FCC must promise to process all vacating stations' applications within sixty days of filing. In addition, all pending DTV applications must be processed as quickly as possible, but no later than thirty days after the close of the 700 MHz auction. At the present time, it appears that there are well over 1000 pending DTV construction permit applications and DTV maximization requests pending at the FCC. With a May 1, 2002 on-air date for commercial television stations, when does the FCC expect to take action on these applications and requests? Furthermore, the DTV deadline imposed by FCC is blind to the fact that DTV transmitter and antenna manufacturers cannot provide such equipment in time for all stations to meet the May 1, 2002 date. Nor can tower companies build enough new towers in that timeframe given the scarcity of special steel

that has to be imported into this country. The FCC's refusal to recognize these fundamental problems will not make them go away.

V. FCC REVIEW OF SPECIFIC CLEARING REQUESTS

PCC supports the FCC's proposed rebuttable presumption that substantial public interest benefits will arise from voluntary band-clearing agreements which meet unambiguous standards.⁵⁸ Likewise, PCC generally supports the FCC's public interest factors regarding the filing and approval of private agreements or voluntary auction, but losses of over-the-air analog service should not be a factor if digital must carry is established and/or other stations are providing over-the-air analog service. Widespread service losses of multiple stations in a community are not in the public interest, and the FCC would have no authorization to allow early band clearing at such expense. However, by establishing full digital must carry rights, correcting the transmission standards for DTV, and setting standards for DTV sets, service losses would be minimized, which, coupled with the public benefits of an accelerated DTV transition and accelerated spectrum availability, gives the FCC the authority to facilitate band clearing. Accordingly, the FCC would not need to require applicants to show there would be no loss of any of the four largest stations in a DMA or the sole service licensed to a local community.⁵⁹

⁵⁸ *Further Notice* at ¶60.

⁵⁹ *Id.* at ¶61.

For the reasons described herein, without full digital must carry, it is doubtful any other FCC authorizations will facilitate early band clearing. If, however, early band clearing occurred without digital must carry (which is unlikely), the proposed public interest requirements described in paragraph 61 of the *Further Notice* would be too restrictive. First, full digital must carry represents the best approach to preventing the loss of service addressed by paragraph 61. If the FCC decides not to establish full digital must carry for DTV broadcasters, as Congress plainly requires, then it would be difficult for the FCC to use the losses of service as justification for barring early band clearing. The FCC has a clearly better way, consistent with Congress' must carry requirements, to prevent those service losses. If the FCC is serious about loss of service, it will establish full digital must carry rights.

Second, television is a wide area service. The FCC recognizes this, acknowledging that where a community losing its only local, over-the-air analog service is part of a larger market, then the FCC would be confident that substantial service remains.⁶⁰ Additionally, the FCC says that the availability of a station's signal over "alternative technologies" such as cable and DBS (or "direct-to-home" or DTH) will mitigate the loss of over-the-air analog service.⁶¹ PCC supports this view. Indeed, PCC urges the FCC to elevate such considerations beyond the proposed case-by-base analysis and create a clear rebuttable presumption that a station can be vacated even if

⁶⁰ *Id.* at ¶63.

⁶¹ *Id.* at ¶64.

it is a community's sole television station so long as the community receives Grade B service from three other television stations.

VI. DIGITAL MUST CARRY IS CRITICAL TO BAND CLEARING.

A. Without the Promise of Digital Must Carry, Incumbent Broadcasters Have No Incentive to Vacate the Band.

As a practical matter, it is difficult to understand from any perspective why broadcasters would clear the channels 59-69 band without assurances that they could continue serving most of their audience. Without digital must carry in cable and DTH, incumbent broadcasters otherwise tempted to vacate are faced with two unattractive options: (1) rely on an questionable transmission standards for over-the-air DTV signals (for which there are few receivers); or (2) transmit in analog and indefinitely forego the ability to participate in the DTV transition. These hardly are the circumstances that will lead any material number of responsible broadcasters to vacate 700 MHz spectrum voluntarily or early.

B. The Law Requires Digital Must Carry for Vacating Incumbent Stations.

It is beyond dispute that cable systems ultimately are obliged to carry broadcasters' digital signals. The FCC obviously recognizes as much, and stated so in the *Further Notice*.⁶² Congress' must carry requirements are not conditioned upon a method of transmission, as it has made plain. A vacating incumbent, as well as all DTV broadcasters, should have enforceable full digital must carry rights for cable and DTH.

⁶² *Id.* at ¶65.

At the direction of Congress, the FCC commenced a proceeding two years ago to address digital must carry's transitional issues.⁶³ The FCC has failed to release a timely set of digital mandatory carriage provisions. Yet even without a Report and Order, the law is clear: "Each cable operator shall carry . . . the signals of local commercial television stations."⁶⁴ There can be no doubt that a broadcast television station transmitting on one and only one channel, be it analog or digital, has enforceable must carry rights. Congress instructed the FCC to "ensure cable carriage" of a local television station's signal that has been "changed to conform" with the DTV standards.⁶⁵ Congress has given the FCC the authority to make changes to ensure DTV must carry. Furthermore, the FCC does not have authority to deny mandatory carriage rights to a vacating incumbent's DTV signals. Simply stated, it's time to "Clear the Air" and establish the rules for full digital must carry for all television stations.

C. The DTV Must Carry Proposal Is Based on The 1992 Cable Act.

In enacting Section 614 of the Communications Act of 1934, as amended (the "Act"),⁶⁶ Congress required cable operators to carry the signals of local commercial broadcast television stations. Congress believed that mandatory carriage was necessary to advance important government interests of promoting the continued

⁶³ Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 1092 (1998).

⁶⁴ 47 U.S.C. § 534(a).

⁶⁵ 47 U.S.C. § 534(b)(4)(B).

⁶⁶ 47 U.S.C. § 534.

availability of free, over-the-air local broadcast television⁶⁷ and ensuring the widespread dissemination of information from a multiplicity of sources – especially separately owned sources.⁶⁸ After two reviews, the Supreme Court upheld the constitutionality of the must carry provisions, finding that Section 614 suitably advanced these important interests.⁶⁹ The Supreme Court’s conclusions control the review of digital must carry provisions, which, in the instance of vacating incumbents, easily satisfy intermediate scrutiny.

The repeatedly filed PCC DTV Must Carry Proposal⁷⁰ permits television stations to elect to have their analog signals removed from cable systems and replaced with their primary digital signals, which would be down-converted by the cable operator to analog and carried on the analog portion of the cable system. This replacement carriage would be to the same number of cable homes and on the same channel as the basic analog carriage. In addition, television stations choosing to allow cable systems to remove their analog signal in favor of their digital signals would have their HDTV or digital multicast signals carried on the digital portion of the cable system, equipped with digital set-top boxes. The cable channel mapping protocol (PSIP) would permit the multicast channels to appear in sequence with the station’s primary channel (*e.g.*, if the primary channel is 20, then the multicast channels would be 201, 202, 203, and 204). A

⁶⁷ 1992 Cable Act, §§ 2(a)(10),(12).

⁶⁸ *Id.*, § 2(a)(6).

⁶⁹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”) (determining that intermediate scrutiny applied); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”) (upholding must carry provisions under intermediate scrutiny).

cable subscriber without a set-top box simply would surf the existing channel lineup from channel 19, to 20, to 21, and so on. A cable subscriber with a set-top box would go from channel 19, to 20, and then to channels 201, 202, 203, and 204, before moving to channel 21. The primary digital signal (carried on the analog portion of the cable systems) and the additional digital signals providing free programming services would be provided as part of the basic cable services provided to all analog cable subscribers and to all subscribers with digital boxes. Thus, as digital set-top boxes are deployed and analog boxes replaced, full digital must carry would come to pass.

This is the basis of the television station must carry rules that were established by the 1992 Cable Act. Section 4 of the 1992 Cable Act clearly provides that “each cable operator shall carry on the cable system of that operator, the signals of local commercial television stations . . . as provided by this section.”⁷¹ The 1992 Cable Act goes on to define a “local commercial television station” as:

any full power broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.⁷²

⁷⁰ See, e.g., Letter from Lowell W. Paxson to William E. Kennard, Chairman, Federal Communications Commission (May 3, 2000).

⁷¹ 47 U.S.C. § 534(a).

⁷² 47 U.S.C. § 534(h)(1)(A).

This carriage requirement makes no distinction between analog and digital signals but is subject only to the cap on the number of useable activated channels that must be set aside for must carry purposes, leaving no room for Commission interpretation.⁷³

Furthermore, Congress was not silent in the 1992 Cable Act with regard to the must carry rights of digital broadcast signals. Section 4 provides that:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to insure cable carriage of broadcast signals of local commercial television stations which have been changed to conform with such modified standards.⁷⁴

The legislative history of this provision makes it clear that Congress intended the Commission to take whatever steps were necessary, from a technical standpoint, to insure that television broadcasters' digital signals (just as with their analog signals) were carried by local cable systems. The House Report interpreting the above language noted that:

The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.⁷⁵

The Commission's directive was clear: make whatever technical changes are necessary to ensure continued must carriage of local television stations in the digital

⁷³ See *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

⁷⁴ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

⁷⁵ H.R. REP. No. 102-628, at 94 (1992).

world. This directive from Congress was contained in the section of the must carry provisions of the 1992 Cable Act dealing with the technical aspects of such must carry, (*i.e.*, signal degradation). The placement of the digital must carry discussion in this same section is indicative of the Congressional intent that the question of must carry was not at issue, just the technical aspects.⁷⁶ After putting off releasing a Report and Order in the two year-old must carry proceeding,⁷⁷ the FCC has thwarted the intent of Congress and crippled the DTV transition.

The PCC DTV Must Carry Proposal implements the technical changes the Commission should make to accommodate digital must carry. Much has been made of the issue of must carry during the digital transition when some stations are broadcasting in analog only and other stations are broadcasting in digital and analog. The FCC made clear that the 1992 Cable Act requires carriage of television stations' digital signals once the transition from analog to digital is complete and stations are broadcasting in the digital format only.⁷⁸ We believe that this is only a partial interpretation of the 1992 Cable Act. PCC's proposal is more comprehensive and is clearly supported by the language of the 1992 Cable Act. Under the PCC DTV proposal, a station that elects to have its digital signal replace its existing analog signal for cable carriage purposes has, for all intents, completed its cable transition to digital broadcasting. The over-the-air

⁷⁶ See *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991).

⁷⁷ Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 1092 (1998).

⁷⁸ *Further Notice* at ¶65.

transition to digital broadcasting will be complete when at least 85% of households are capable of receiving digital broadcasts (via all delivery methods).⁷⁹ There is no rule or policy reason for the FCC not to recognize that stations have chosen to operate digitally and to require cable operators to honor their complete digital must carry requests.

The Conference report accompanying the 1992 Cable Act required the Commission to “conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry televisions signals complying with such modified [i.e., digital] standards in accordance with the objects of this section.”⁸⁰ The FCC was directed by Congress to accomplish exactly what we have proposed in our must carry plan; namely, ensure that television stations transitioning to digital continue to have their free over-the-air broadcast services available as a part of the basic service tiers of cable systems regardless of whether the television station is broadcasting in HDTV or in digital multicast. If the FCC Chairman is worried about the First Amendment implications of full digital must carry, he must be reminded that the courts are where the issue should be decided, not on the eighth floor.

Congress did not limit such carriage rights to single program services or to analog programming only but simply to free over-the-air programming. In fact, Congress specifically directed the FCC to recognize and accommodate the carriage rules to the new digital environment of its television stations which have initiated their digital broadcasting. The legislative history of the Telecommunications Act of 1996,

⁷⁹ 47 U.S.C. § 309(j)(14)(B).

⁸⁰ CONF. REP. NO. 102-862, at 67 (1992).

Pub. L. No. 104-104, makes it clear that congress assumed that it had already taken care of digital must carry. The 1996 Telecommunications Act was intended to address only subsidiary issues relating to such must carry – not the basic grant of digital must carry rights. PCC's DTV proposal allows individual stations to determine their digital transition, for cable carriage purposes, and, in the process, will not only hasten broadcasting's conversion to digital but will mitigate any impact on cable operators by spreading out the implementation of digital must carry as different stations elect digital must carry at different times.

D. DTV Must Carry Furthers Important Government Interests.

Digital operation by vacating analog incumbents does not change the Supreme Court's analysis that must carry rules are constitutional. In *Turner I*, the Supreme Court held that must carry requirements advance three interrelated important government interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.⁸¹ As the Supreme Court stated explicitly in *Turner II*, "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest."⁸² "[B]roadcasting is demonstrably a principal source of

⁸¹ *Turner I*, 512 U.S. at 662.

⁸² *Turner II*, 520 U.S. at 190 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)); 1992 Cable Act, § 2(a)(12).

information and entertainment for a great part of the Nation's population"⁸³ and there is a corresponding "governmental purpose of the highest order" in ensuring access to a multiplicity of sources.⁸⁴

Congress believed that the mandatory carriage was necessary to prevent "a reduction in the number of media voices available to consumers"⁸⁵ and found that the cable industry posed a threat to free, over-the-air broadcast television.⁸⁶ Evidence indicated that cable systems had both the incentive and ability to drop carriage of local broadcast stations to favor affiliated cable programmers,⁸⁷ causing Congress to predict that the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."⁸⁸ In *Turner II*, the Supreme Court affirmed, on the basis of a substantial record, that the must carry provisions advanced the important governmental interests in a direct and material way.

These government interests are squarely at issue with vacating analog incumbents. Without full digital must carry, the service delivered by displaced stations would not be preserved. Viewers without cable (or cable households using uncabled receivers) would be unable to receive a vacating station's signals. The multiplicity of

⁸³ *Turner II*, 520 U.S. at 190 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

⁸⁴ *Id.*

⁸⁵ 1992 Cable Act, § 2(a)(4).

⁸⁶ *Turner II*, 520 U.S. at 199.

⁸⁷ *Id.*

voices would be diminished and competition for viewers and advertising would be reduced. It is difficult to imagine how or when a vacating station could rebuild its viewership if unable to obtain full digital must carry rights until the end of the DTV transition.

Moreover, the digital transition provides the government with an additional interest to satisfy the applicable standards of intermediate scrutiny set forth in *Turner I* and applied in *Turner II*. Congress identified the prompt transition to digital television as an important national interest, creating a more efficient use of the electromagnetic spectrum, recovering portions for new uses, and generating additional federal revenues.⁸⁹ The implementation of digital television precisely raises the same concerns about loss of service, economic failure, and discriminatory treatment that initially prompted Congress to enact the mandatory carriage provisions. DTV was implemented to preserve a free, universal broadcasting service and promote the full benefit of the new technology to the public.⁹⁰ Full digital must carry advances these interests as well, an importance magnified by the presently faltering nature of the DTV transition.

Cable operators' and DTH providers' technological bottleneck control provides them ample power to discriminate against DTV broadcasters. Cable operators and DTH providers have ample anti-competitive incentive to deny carriage to DTV

⁸⁸ 1992 Cable Act, § 2(a)(16).

⁸⁹ 47 U.S.C. § 337.

⁹⁰ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, 10 FCC Rcd 10540, 10541 (1995).

broadcasters. Cable operators and DTH providers can again threaten the economic viability of local broadcast stations and reduce the multiplicity of separately owned voices. The government's same important interests that the mandatory carriage provisions constitutionally advance plainly apply to DTV stations and more so to the incumbents.

E. It is Time to Jump-Start the DTV Transition.

The DTV transition is faltering. By establishing full digital must carry rights for vacating incumbents, a significant number of stations would have a strong incentive to promote DTV specifically and generally. There will be a stronger impetus to resolve remaining DTV issues and obstacles. The critical mass of programming needed before consumers purchase digital receivers would be attainable. The DTV transition would be accelerated, and the FCC would recover the valuable analog spectrum more quickly. Early band clearing and full digital must carry is a win-win-win.

VII. ADDITIONAL ISSUES THAT THE FCC SHOULD ADDRESS TO FACILITATE BAND CLEARING.

A. The FCC Should Issue a Report and Order in the Cable Compatibility Proceeding.

The FCC should adopt clear and enforceable connection and copyright protection standards before the end of the year, pursuant to its open cable compatibility proceeding.⁹¹ This action will provide vacating incumbents assurances that technical

⁹¹ Compatibility Between Cable Systems And Consumer Electronics Equipment, PP Docket No. 00-67, *Notice of Proposed Rulemaking*, FCC 00-137 (rel. Apr. 14, 2000) ("*Compatibility Notice*").

roadblocks will not be used to deny digital service to viewers of the stations' terminated analog service. In the *Compatibility Notice*, the FCC identified two "critical unresolved matters:" (1) requirements for a DTV receiver to be labeled "cable-compatible" (specifically, whether an IEEE 1394 "firewire" connector would be required), and (2) licensing terms for copy protection technology.⁹² Compatibility between DTV receivers, cable systems, and set-top boxes is required not only for a seamless digital transition, but so that consumers easily understand the capabilities of new digital technology. Digital copy protection is important because of content creators' concerns about the ease of producing large numbers of high-quality copies of digital video content. PCC and other broadcasters have grown increasingly concerned and frustrated that cable operators, television set manufacturers, and content creators lack the incentives to establish standards promptly. The FCC recognizes that "[w]ithout resolution of outstanding compatibility issues, the transition from analog to digital broadcasting will be slowed, and the reclamation and reallocation of a portion of the spectrum now allocated for analog television service will be delayed." Accordingly, PCC urges the FCC to take the steps necessary to have compatibility and copy standards in place by November 13, 2000.

B. The FCC Should Resolve the Transmission Standard Issues.

A huge and increasing number of broadcasters are urging the FCC to revise the modulation standard for DTV transmissions and permit the use of COFDM in addition to the current 8-VSB standard. Series of tests by Sinclair Broadcast Group and others

⁹² *Id.* at ¶3.

have shown that indoor DTV reception is rendered unreliable by multipath signal reflections.⁹³ In last month's hearing before the House Telecom Subcommittee, the FCC reiterated its belief that, trade-offs considered, 8-VSB would remain the sole modulation standard, hoping that reception problems could be resolved by as yet undemonstrated means.⁹⁴ Given the alleged lack of superiority of either standard, PCC urges the FCC to permit the use of COFDM, as most of the rest of the world has done, in addition to 8-VSB. By November 13, 2000, the FCC should (1) definitively and conclusively determine that the existing DTV modulation standard will result in reliable replication or permit the use of the alternative COFDM standard (or sanction either modulation standard); and (2) begin adopting digital receiver standards so that viewers can obtain reliable, over-the-air digital service. Such action will ensure that all viewers are protected from loss of service once analog transmissions are terminated and, more immediately, provide incumbents with realistic incentives to vacate the band.

C. The FCC Should Permit Noncommercial Digital Stations to Air Advertiser-Supported Commercial Television Programming Via Excess Digital Spectrum.

The FCC should accommodate public broadcasters and permit their multicasting of secondary, third party, advertiser-supported commercial DTV multicast programming,

⁹³ Letter from Magalie Roman Salas, Secretary, FCC, to Mr. Martin R. Leader, counsel, Sinclair Broadcast Group (Feb. 3, 2000) (FCC 00-35).

⁹⁴ *Hill Questions Slow DTV Rollout as Modulation is Debated*, COMMUNICATIONS DAILY, July 26, 2000.

as contemplated.⁹⁵ The ban against advertising on public stations should not apply to noncommercial broadcasters' entire digital spectrum. Noncommercial stations, especially educational stations, are well positioned to employ multicasting to expand programming options and reach different audiences. Permitting advertiser-supported multicasting will help facilitate such use, help the economics of non-commercial stations, and demonstrate multicasting's viability in the digital marketplace.

VIII. COST SHARING RULES FOR BAND CLEARING.

PCC will support the FCC's proposal to permit the 700 MHz auction winners to reach private cost-sharing arrangements to pay incumbent broadcast licensees in the secondary auction.⁹⁶

IX. CONCLUSION.

Bud Paxson, the single majority shareholder and Chairman of the Board of PCC, labored in the channels 59-69 desert, and as creator and co-founder of the Home Shopping Network, Inc. ("HSN"), he built the eleven stations that USA Network, Inc. now has in the channels 59-69 band. At PCC, he has built eighteen more stations in the channels 59-69 band. Mr. Paxson has built two networks out of the upper UHF channels: HSN and now **PAXTV**. In the process, HSN, under Mr. Paxson's direction, funded the construction or acquisition of seven minority-owned television stations (all in

⁹⁵ Ancillary and Supplementary Use of Digital Television Capacity by Noncommercial Licensees, MM Docket No. 98-203, *Notice of Proposed Rule Making*, FCC No. 98-304, at ¶¶36-37 (1998).

⁹⁶ *Further Notice* at ¶82.

the UHF band), and by June 1994, 31% of minority-owned commercial television stations in this country were HSN affiliates – and 25% of them had their construction/acquisition funded by HSN. No one should think that because broadcasters such as Mr. Paxson developed this wasteland, they are bad actors for possibly entering into private contracts with 700 MHz bidders. PCC developed this spectrum that no one else wanted and in the process added many new and minority-owned stations to the broadcast arena. This spectrum was not given to PCC or any of the other broadcasters in the band. It was purchased, developed, and nurtured into a vibrant, free, over-the-air programming service. Yet in the press, broadcasters in the channels 60-69 band are described as squatters and impediments to the future. It is the essence of the American dream for someone to find oil on your property – or other profitable or worthwhile uses for spectrum.

Over three months ago, and before the FCC began to postpone the 700 MHz auction, PCC advised the FCC Commissioners that **“there is an inevitable linkage between the Commission’s decision on DTV must carry and your agency’s success in maximizing the public revenue and benefits from the 700 MHz auction.”** Now after three 700 MHz auction delays, the linkage that PCC noted still is the key, and the responsibility is on the FCC to utilize that linkage to break the deadlock. If the Commission fails to act, it will lose its last opportunity to save digital

television from an ugly death and lose an opportunity to create a powerful wireless internet. It is now up to the FCC to act!

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

Name:	William L. Watson
Title:	Vice President and Assistant Secretary

PAXSON COMMUNICATIONS CORPORATION
601 Clearwater Park Road
West Palm Beach, FL 33401
561/659-4122
August 16, 2000